84-737 (1)

No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

SAMUEL T. GINDES and JOAN L. GINDES, *et al.*,
Petitioners,

v.

THE UNITED STATES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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58 PP

QUESTION PRESENTED FOR REVIEW

Did the Commissioner of Internal Revenue err in disallowing depreciation deductions, and abuse his discretion in retroactively applying income tax regulations in a manner which caused petitioners to forfeit the benefits of a stepped-up basis for property acquired by inheritance?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Federal Circuit entered in the above-mentioned case on August 8, 1984.

LIST OF PARTIES TO PROCEEDING BELOW

The names of the parties in the lower court are as follows:

Samuel T. Gindes
Joan L. Gindes
Edward H. Kaplan
Jerome A. Kaplan
Deena L. Kaplan[1]

CITATION TO OPINIONS BELOW

The opinion of the Court of Appeals is reported at 740 F.2d 947 (1984) and appears at pp. 1a-9a of the Appendix to this petition. The earlier opinion of the United States Court of Claims was reported at 661 F.2d 194 (Ct. Cl. 1981), *Gindes* v. *United States,* and is reproduced in the appendix at pp. 11a-30a.

JURISDICTION

The judgment of the Court of Appeals was entered on August 8, 1984.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

STATUTES AND REGULATIONS INVOLVED

The statutes pertinent to this case are Sections 754, 167(g), 1011(a), 1011(b), 1014(a), 1014(b) and 7805(b) of the Internal Revenue Code (Title 26, U.S.C.). Relevant regulations are identified as Sec-

[1] These proceedings were commenced in the United States Court of Claims by the filing of several separate petitions. These cases were later consolidated and disposed of as a single matter. One of the original cases in the Court of Claims (*Nathan Sinrod, Trustee*) was dismissed by agreement and was not involved in the appeal.

tion 1.754-1 of the Federal Income Tax Regulations, both in their 1956 and 1972 versions.

The aforementioned statutes and regulations are reproduced in the Appendix at pp. 31a-37a.

STATEMENT OF THE CASE

The various petitions seeking refunds of Federal income taxes paid were in the first instance filed in the United States Court of Claims. That court (since replaced by the United States Claims Court) had jurisdiction over such suits for refunds pursuant to 26 U.S.C. Section 7422.

This matter involves seven consolidated proceedings, originally filed in the United States Court of Claims. In these suits, petitioners (hereinafter "taxpayers") sought refunds of income taxes as a result of the denial of various claims filed with the Commissioner of Internal Revenue (hereinafter "Commissioner"). The claims, directly or indirectly, were predicated on taxpayers' contention that they were entitled to allowances of additional depreciation by reason of the death of Charles J. Kaplan, which occurred on January 27, 1964. Cross motions for partial summary judgment were filed in the trial court. On September 23, 1983, a three-judge panel of the United States Court of Claims issued its opinion (App. 11a-30a). The court granted the Government's motion, denied that of the taxpayers and remanded the matter to the trial division for further proceedings.

The undisposed issues for which the matter was remanded were subsequently resolved by agreement,

and judgment was entered by the United States Claims Court accordingly.

The taxpayers filed a timely notice of appeal to the United States Court of Appeals for the Federal Circuit and a suggestion for hearings *In Banc.* The suggestion was declined and the matter, following briefing and oral argument, was decided by a three-judge panel which affirmed the ruling below.

Taxpayers Edward H. Kaplan ("Edward"), Jerome A. Kaplan ("Jerome"), and Joan L. Gindes ("Joan") are the children of Charles I. Kaplan ("Charles") and Mary Kaplan ("Mary"). In 1950, Mary established inter vivos trusts for the benefit of Edward and Jerome, naming Charles and Nathan Sinrod as co-trustees. As of December 31, 1963, these trusts each owned the following property interests, which were transferred to the trusts by Charles during his lifetime:

Properties	% Interest owned by Edward Kaplan Trust	% Interest owned by Jerome Kaplan Trust
Chillum Road Shopping Center	6.0	6.0
Dupont Park Apartments	2.73	2.78
4000 Massachusetts Avenue	2.5	2.5
1000 Connecticut Avenue	5.0	5.0
Riddell Building Parking Garage	5.0	5.0
1700 K Street, N.W.	2.5	2.77
1730 K Street, N.W.	7.5	7.5

Charles died on January 27, 1964. Prior to his death, he had created trusts under his will (hereinafter referred to as "trusts U/W") for the benefit of Edward, Jerome, and Joan. The corpus of each

trust U/W consisted of 19 separate property interests, listed *infra*, pages 5a-6a. Each of the interests which was transferred into trust pursuant to the will was divided into six shares. Three shares of each went into the marital deduction trust created for the benefit of Mary, and one share went into each of the three trusts U/W for the benefit of Edward, Jerome, and Joan.

The estate tax return for Charles' estate was filed on April 27, 1965. None of the property transferred by him into the inter vivos trusts for the benefit of Edward and Jerome was included in the gross estate on the return.

The estate tax return was audited by the Internal Revenue Service, and in a report dated August 11, 1967, the examining officer recommended a number of adjustments to the gross estate. Included among these adjustments were increases in the values of a number of the properties, interests which had been transferred to both the inter vivos trusts and the trusts under the will. The following table reflects the fair market values of these interests on the date of death, as reported on the estate tax return, and where applicable, as corrected by the Internal Revenue Service.

	% Interest	Reported Value	Corrected Value
Chillum Road Shopping Center	7.0	$ 24,000	
Dupont Park Apartments	7.22	24,270	$ 38,000
4000 Massachusetts Avenue	10.0	225,200	275,000
1000 Connecticut Avenue	7.5	191,040	250,000
Riddell Building Parking Garage	7.5	22,700	
1700 K Street, N.W.	11.11	159,400	250,000

	% Interest	Reported Value	Corrected Value
1730 K Street, N.W.	7.5	125,802	200,000
Berkshire Associates	5.0	98,050	
Cathedral Parkway Associates	15.0	45,000	
The Essex	25.0	201,000	226,500
20th & M Streets	12.69	190,350	
2401 Calvert St., N.W.	20.834	31,250	
1760-64 K Street, N.W.	20.0	17,200	
Berkshire-Richmond	50.0	Worthless	56,700
Mall Development Associates	25.0	Worthless	6,250
Parkland Gardens	12.5	28,500	42,000
Garden Manor Apartments	25.2	116,250	
Hague Towers	12.5	13,750	
3100 M Street, N.W.	100.0	35,000	

The examining officer also recommended that, because of Charles' power, as co-trustee of the inter vivos trusts for the benefit of Edward and Jerome, to accelerate the distribution of the corpora thereof, the value of the partnership and joint venture interests he had transferred into those trusts should be included in this gross estate.

On January 3, 1968, the estate was sent a statutory notice of deficiency setting forth those proposed adjustments. On March 28, 1968, the estate filed a timely petition with the Tax Court seeking a redetermination of the deficiency insofar as it was based upon the valuation of Charles' interest in the Berkshire-Richmond and upon the inclusion in Charles' estate of the assets he had transferred to the inter vivos trusts. *Estate of Charles I. Kaplan,* Tax Ct. Dtk. No. 1461-68. The case was settled on the basis of the Government conceding that Charles' interest in the Berkshire-Richmond was worthless, and by

the estate conceding that the seven interests transferred by Charles to the inter vivos trusts were includible in his estate. A stipulated decision reflecting the deficiency due pursuant to this settlement was entered by the Tax Court on May 6, 1969.

The principal assets of most of the properties, with the exception of 20th & M Streets and 2401 Calvert St., N.W., consisted at the time of Charles' death of improved real property which was subject to an allowance for depreciation under applicable provisions of the Internal Revenue Code of 1954. The business here involved consisted of operating and managing, through independent property management firms, apartment house complexes, commercial office buildings, shopping centers, and similar type rental properties.

At all times relevant to this litigation, U.S. Partnership Return of Income, Forms 1065, were annually filed with the Internal Revenue Service. These returns listed the depreciable property, with respect to which depreciation deductions are sought in this litigation, as assets of the respective partnerships and joint ventures.

The original cost bases and book values (cost basis less accumulated depreciation) for the buildings and other fixed depreciable assets at the end of the taxable year 1963 were as follows:

	Basis	Book Value
Chillum Road Shopping Center	$ 864,010	$ 665,384
Dupont Park Apartments	1,463,304	1,387,883
4000 Massachusetts Avenue	4,733,630	4,087,025
1000 Connecticut Avenue	4,002,087	2,451,199

	Basis	Book Value
Riddell Building Parking Garage	295,448	232,687
1700 K Street, N.W.	2,583,412	1,359,170
1730 K Street, N.W.	4,381,217	3,359,083
Berkshire Associates	4,521,981	3,949,326
Cathedral Parkway Associates	3,557,609	3,375,585
The Essex	2,607,170	1,628,194
20th & M Streets	(unimproved	land only)
2401 Calvert St., N.W.	(unimproved	land only)
1760-64 K Street, N.W.	24,682	20,883
Berkshire-Richmond	4,313,618	4,261,059
Mall Development Associates	2,051,484	1,956,883
Parkland Gardens	518,593	135,468
Garden Manor Apartments	241,466	110,398

At the time of Charles' death, no elections under Section 754 to adjust the basis of partnership property under Sections 734(b) or 743(b) were in effect for any of the properties. None of the partnership returns filed by the partnerships and joint ventures for 1964, the year of Charles' death, contained an election under Section 754, nor was there on these returns, or the returns filed for 1965 through 1967, a special depreciation schedule attributable to Charles' interest. All depreciation schedules for these years were regular continuations of original cost amounts with no reference to Charles' death.

The following elections under Section 754 were filed with returns for the year 1969:

Chillum Road Shopping Center
Dupont Park Apartments
4000 Massachusetts Avenue
1000 Connecticut Avenue
1700 K Street, N.W.

1730 K Street, N.W.
Berkshire Associates
Cathedral Parkway Associates
The Essex

For the calendar year 1964, the Federal fiduciary income tax returns filed by the trusts for Edward, Jerome and Joan under the will of Charles I. Kaplan reported "income from partnerships" but did not reflect any adjustments for additional depreciation attributable to decedent's death. For calendar years 1965, 1966 and 1967, however, the fiduciary returns filed by these trusts included a schedule reflecting an adjustment of income for additional depreciation representing an increment for fair market value excess. This adjustment was based upon the values reported on decedent's estate tax return.

Following entry of the decision of the United States Tax Court in Docket No. 1461-68, *Estate of Charles I. Kaplan,* (May 6, 1969), the Internal Revenue Service notified the estate of final adjustments by letter dated January 23, 1970.

ARGUMENT

As noted above, the Court of Appeals affirmed the judgment of the United States Claims Court on the basis of the previous appellate ruling of the United States Court of Claims. In doing so, the Court of Appeals relied largely on the doctrine of the law of the case in accepting as binding the ruling of its predecessor appellate court. We believe that the Court of Appeals was mistaken in applying the law of the case to the instant controversy. It is univer-

sally recognized that the doctrine has no effect on the decisions of a higher appellate court in the same case. The Congress, in enacting the Federal Courts Improvement Act of 1982, Public Law No. 97-164, gave the Court of Appeals for the Federal Circuit full authority to reverse decisions of the Claims Court, without limiting that review to cases in which that court's predecessor was not acting in an appellate capacity. We submit that absent such Congressional authority, the court could not on its own impose a limitation on the scope of appellate review. However, since the opinion of the Court of Appeals suggests that in any event it was not persuaded that the former ruling was erroneous, we proceed to a discussion of the merits of the dispute.

The decedent's children, who are the taxpayers here, inherited, through various testamentary trusts, a number of property interests. During the decedent's lifetime, and subsequently, partnership income tax returns were filed on behalf of these properties. Although the decedent died in 1964, no election under Section 754 of the Internal Revenue Code was filed until the time the 1969 partnership returns were submitted. This coincided approximately with the settlement of an estate tax controversy involving the decedent's estate. Beginning with returns filed by the testamentary trusts for the year 1965, adjustments were included that expressly refer to a claimed deduction for additional depreciation by reason of an increase in fair market value of the property at the time of the decedent's death.

Taxpayers contend that the information appended to the fiduciary returns gave sufficient notice of the

intention to use the "optional" adjustment to depreciable property. At least in the light of the regulations in force in 1964, this interpretaion was reasonable. The Commissioner's contrary conclusion, as affirmed by the lower courts, that the election must be made on the partnership returns "for the first taxable year during which the distribution or transfer occurs" leads to unreasonable and inequitable results. Moreover, the retroactive application of the 1972 regulations produces unwarranted inequities and is not in accord with the appropriate legal standard for retroactive use of regulations.

Section 754 of the Internal Revenue Code provides for "electing optional" adjustments to the basis of partnership property. The method of making such an election is left to "regulations prescribed by the Secretary". Under Section 743 of the Code, the death of a partner is one of the grounds for such "optional adjustment". The Secretary adopted Income Tax Regulation 1.754(b) on May 23, 1956, and amended the same in October, 1972. For purposes of this litigation, the significant distinction between the 1956 and 1972 versions of the regulations lies in the fact that under the 1956 regulation, the election was to be filed "for the first taxable year to which the election applies", whereas the 1972 regulation mandates that it be filed "for the taxable year during which the distribution or transfer occurs". In our case, the stipulated facts show that none of the "partnerships" made an election until 1969, although the decedent died on January 27, 1964.

We recognize that in *Jones* v. *United States,* 213 Ct. Cl. 529, 553 F.2d 667 (1977), the court upheld the validity of regulations under Section 754, includ-

ing the retroactive application of the 1972 amendment. We submit that the facts of this case further demonstrate that *Jones* was incorrectly decided. Beginning with the year 1965—the first year during which the valuation of the estate of Charles I. Kaplan could be determined—the income tax returns filed by the testamentary trusts reflected full information with respect to the additional depreciation claimed. The Commissioner was thus fully apprised of the taxpayers' intention to claim the additional deduction. We submit that under the wording of the 1956 regulations, the taxpayers could reasonably conclude that later elections by the "partnerships" to adjust their assets would be effective *as to those entities* from the time the elections were made, without thereby forfeiting any rights to depreciation deductions for the intervening years.

We suggest that the position urged by the Government would seek to impose a penalty on the taxpayers for their failure to have made the election in 1964 in the manner required in 1972. The statute imposes no condition that the election must be made in the year of transfer or death and neither does the 1956 regulation. We submit that it would defeat the Congressional intent to sustain regulations under circumstances where they will cause an unwarranted forfeiture. *Neel* v. *U.S.* (D.C. Ga. 1966), 266 F.Supp. 7; *Hornberger* v. *Commissioner* (5th Cir. 1961), 289 F.2d 602. Regulations in order to be valid must not only be consistent with the statute, they must also be reasonable. *Manhattan Co.* v. *Commissioner,* 297 U.S. 129 (1936). The allowance for depreciation "in respect to any property" is to be determined as provided in Section 1011 of the Code; see also: Sec-

tion 167(g) of the Internal Revenue Code. Reference to Section 1011 discloses that the applicable section dealing with "basis of property acquired from a decedent" is Section 1014. The latter Code provision makes clear that, with exceptions not relevant, the basis of such property is its fair market value as of the date of death. We submit that when Section 754 speaks of an "optional" adjustment to partnership property, it did not thereby abrogate the right of individual taxpayers to obtain recovery of fair market value through depreciation, as authorized by the aforementioned sections. We submit that the fact that a partnership may or may not elect to avail itself of an adjustment was never intended to deny with finality the ability of estate or trust beneficiaries to claim a deduction to which they are otherwise entitled by law.

As a minimum, there is ample justification for the conclusion that the Government's position is sufficiently ambiguous to prevent literal application of the 1972 regulations to the facts of this case to avoid a result that is both unreasonable and inequitable.

The Court of Claims rejected taxpayers' arguments on retroactivity by reference to Section 7805(b) of the Internal Revenue Code. That Section delegates to the Secretary the authority to limit the retroactive effect of regulations. No such action has been taken with reference to the regulations here under discussion. Without losing sight of the broad discretion conferred by virtue of Section 7805(b), it is well-established that this authority is not unlimited and subject to judicial review. As the Court of Claims said in *International Business Machines Corp.* v. U.S., 343 F.2d 914 (1965):

> The third principle inherent in Section 7805(b) is that the Commissioner's exercise of discretion is reviewable (in a proper proceeding) for abuse, in the same way as other discretionary administrative determinations. The Internal Revenue Service does not have *carte blanche.* Its choice must be a rational one, supported by relevant considerations. See Automobile Club of Michigan v. Commissioner, and the other cases cited supra; Lesavoy Foundation v. Commissioner, supra; Lynn and Gerson, Quasi-Estoppel and Abuse of Discretion as Applied Against the United States in Federal Tax Controversies, 19 Tax L. Rev. 487, 509 ff. (1964).

See also: *Central Illinois Public Service Co.* v. U.S., 435 U.S. 21, 98 S.Ct. 917 (1978), concurring opinions of Chief Justice Burger, Justices Brennan and Powell; Mertens Law of Federal Income Taxation, Section 3.25 (1974).

We are not here concerned with the retroactive action by the Commissioner to correct a clear error of law, as in *Automobile Club* v. *Commissioner,* 353 U.S. 180 (1957). Rather, we are dealing with the taxpayers' good faith reliance on a filing requirement, which the Court of Claims acknowledged was "left unclear" (App. p. 22a). Thus, the taxpayers, at the risk of total loss of otherwise lawful deductions, were forced to exercise an election in 1964 in a manner not clearly defined by the Commissioner until some eight years later. We submit that the consequences to these petitioners, as sustained by the lower courts, are indeed "inordinately harsh". *Anderson, Clayton & Co.* v. *U.S.,* 562 F.2d 972 (5th Cir. 1977), cert. den., 436 U.S. 944 (1978). This case is illustrative of those fact situations in which a "sense

of justice and fair play" should prevent the Commissioner from being allowed to inflict the injury. *Schuster* v. *Commissioner,* 312 F.2d 311 (9th Cir. 1962). When taxpayers inherit property which has an increased value that is recognized for estate tax purposes, it is appropriate for them to recover that increase through depreciation. It serves no valid legislative or administrative purpose to deprive them of that tax benefit through retroactive reliance on ambiguous regulations.

CONCLUSION

For the reasons heretofore stated, petitioners submit that the writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Appeal No. 84-700

SAMUEL T. GINDES and JOAN L. GINDES, ET AL., *Appellants,*

v.

THE UNITED STATES, *Appellee.*

DECIDED: August 8, 1984

Before FRIEDMAN and RICH, *Circuit Judges,* and NICHOLS, *Senior Circuit Judge.*

FRIEDMAN, *Circuit Judge.*

This is an appeal from a judgment of the United States Claims Court insofar as that judgment failed to grant the appellants recovery on certain tax refund claims. The judgment was in accord with the prior decision of the Court of Claims that granted summary judgment for the United States on those claims. *Gindes v. United States,* 661 F.2d 194 (Ct. Cl. 1981). In this appeal the appellants seek to relitigate the identical issues that that decision resolved against them. We hold that the prior decision of the Court of Claims is the law of the case, and affirm.

I

The will of Charles I. Kaplan, who died in June 1964, created a number of trusts for the benefit of his wife and

children. (The appellants here are the children.) The corpus of each trust consisted of interests Mr. Kaplan had upon his death in 19 real estate partnerships. With minor exceptions here irrelevant, the assets of those partnerships consisted of real property upon which substantial depreciation had been taken in the federal partnership tax returns.

The federal estate tax return of Charles Kaplan was filed in April 1965. The Commissioner assessed a deficiency, ruling that the gross estate also included the interests in certain of those partnerships that Charles Kaplan had transferred to inter vivos trusts before his death. The estate challenged in the United States Tax Court the assessment of that deficiency and also another deficiency resulting from the Commissioner's redetermination of the value of the decedent's interest in one of the partnerships. The Tax Court suit was settled in 1969 when the government accepted the estate's valuation of the partnership and the estate accepted the Commissioner's inclusion in the gross estate of the partnership interest transferred to the inter vivos trusts.

Following and apparently as a result of the settlement of the Tax Court case, the appellants became aware that if the partnerships made an "election" under section 754 of the Internal Revenue Code of 1954, 26 U.S.C. § 754 (1982), the basis of the partnership property could be adjusted to reflect the transfer of Mr. Kaplan's interests in the partnership property from him to the trusts. The result would have been to increase the amount of depreciation the partnerships could take. The partnerships could pass the additional depreciation to the trusts, and the trusts could pass the larger depreciation to the beneficiaries, the appellants, for use on their personal income tax returns.

Nine of the partnerships filed elections under section 754 with their partnership returns for 1969. The appellants filed refund claims for other partnerships for various years

between 1961 and 1970. The Commissioner denied the refund claims. The appellants then filed the present suit for refund in the Court of Claims.

Both sides moved for summary judgment. In a lengthy opinion, the Court of Claims granted the government partial summary judgment. With respect to the issues before us, the court held that the partnership elections under section 754 were ineffective because untimely filed under Treasury Regulation 1.754-1(b)(1). That regulation, promulgated in 1972, requires that the partnership make the section 754 election "with the partnership return for the taxable year during which the distribution or transfer occurs." Treas. Reg. § 1.754-1(b)(1) (1984). The court held that since the transfer to the trusts of Charles Kaplan's interests in the partnerships took place upon his death in 1965, any effective election by the partnerships was required to have been made in the partnership returns for that year, and that the appellants' attempts to make an election in 1969 were ineffective.

The court ruled that Treasury Regulation 1.754-1(b)(1) properly was applied retroactively to the 1965 transfers. It rejected the appellants' claim that the doctrine of equitable recoupment entitled them to avoid the time bar of the regulation. Finally, the court held that the appellants were precluded from arguing that the partnerships were not in fact partnerships because they failed to raise that point in their claim for refund with the Commissioner.

The court remanded the case to the trial division for further proceedings consistent with its opinion. The court denied rehearing and a suggestion for rehearing en banc. *See* 228 Ct. Cl. 632.

On October 1, 1982, the Court of Claims ceased to exist. Its appellate functions were assumed by this court, and its trial functions were assumed by the newly created United States Claims Court. Federal Courts Improvement Act of

1982, Pub. L. No. 97-164, 96 Stat. 25 (1982). Under that Act, the Claims Court obtained jurisdiction over the remaining issues in this case. *Id.* § 403(d), 96 Stat. at 58.

The parties settled those issues. On October 27, 1983, the Claims Court entered a judgment in accordance with that settlement, determining the amounts the appellants were to recover. The present appeal is from that judgment.

The appellants presumably challenge that judgment for its failure to rule in their favor on the issues on which the Court of Claims had granted summary judgment for the United States. We assume *arguendo* that the appellants may do so, despite the determination in the prior decision that the petitions were "dismissed to [the] extent" that the government's motion for partial summary judgment was granted. 661 F.2d at 203.

II

A. "The doctrine of law of the case 'expresses the practice of courts generally to refuse to reopen what has been decided.' *Messinger v. Anderson*, 225 U.S. 436, 444, 32 S. Ct. 739, 740, 56 L.Ed. 1152 (1912). Thus, 'once a case has been decided on appeal, the rule adopted is to be applied, right or wrong, absent exceptional circumstances, in the disposition of the lawsuit.' *Schwartz v. NMS Industries, Inc.*, 575 F.2d 553, 554 (5th Cir. 1978)." *United States v. Turtle Mountain Band of Chippewa Indians*, 612 F.2d 517, 520 (Ct. Cl. 1979). The doctrine rests upon the important public policy that "[n]o litigant deserves an opportunity to go over the same ground twice, hoping that the passage of time or changes in the composition of the court will provide a more favorable result the second time." *Id.* "The purpose of the law-of-the-case principle is to provide finality of judicial decisions." *Id.* at 521; *see also Northern Helex Co. v. United States*, 634 F.2d 557, 561-62 (Ct. Cl. 1980).

This court treats the decisions of its two predecessor courts as binding precedents. *South Corp. v. United States*, 690 F.2d 1368 (Fed. Cir. 1982). Although the prior decision of the Court of Claims in this case was not rendered in an appeal, we nevertheless conclude that, considering all the circumstances, it is appropriate to treat that decision as the law of the case.

The Court of Claims functioned in both a trial and an appellate capacity. Cases in that court were tried before its trial division of judges appointed by the court. The trial judges rendered only recommended decisions, which the court then reviewed in substantially the same way that we now review decisions of the Claims Court.

The Court of Claims also functioned as an appellate tribunal in reviewing decisions of various administrative agencies such as the Indian Claims Commission and the Boards of Contract Appeals. Finally, the court decided a substantial number of cases by ruling on dispositive motions, such as motions for partial summary judgment involved in the prior decision in this case. The court normally decided those cases after full briefing and oral argument, as it did here. *See Gindes*, 661 F.2d at 195.

The decisions the Court of Claims rendered on dispositive motions that decided the case are sufficiently analogous to decisions rendered on appeal to justify treating them as the law of the case. This conclusion accords with and serves the policies underlying that doctrine set forth above. The appellants give no convincing reason why the law-of-the-case doctrine should not be applied here, other than the technical and unconvincing point that the prior decision was rendered not on an appeal, but on cross-motions for summary judgment under the unique procedure the Court of Claims followed in deciding legal issues in cases involving no material factual disputes. Indeed, the Court of Claims described the law of the case as the rule that "a

decision by the court on a point in a case becomes the law of the case unless or until it is reversed or modified by a higher court." *Raylaine Worsteds, Inc. v. United States,* 196 F. Supp. 723, 726 (1956).

> B. Although law of the case "is not an inexorable command" (*White v. Murtha, supra,* 377 F.2d at 431), as a matter of sound judicial practice, a court generally adheres to a decision in a prior appeal in the same case unless one of three "exceptional circumstances" exists: "the evidence on a subsequent trial was substantially different, controlling authority has since made a contrary decision of the law applicable to such issues, or the decision was clearly erroneous and would work a manifest injustice." *Id.* at 432.

Turtle Mountain Band, 612 F.2d at 521.

The appellants argue that their case comes within the third exception because the prior decision "was clearly erroneous and would work a manifest injustice." "The standard under this exception is a stringent one. . . . A mere suspicion of error, no matter how well supported, does not warrant reopening an already decided point. Only if we were convinced to a certainty that our prior decision was incorrect would we be warranted in now reexamining [it]." *Northern Helex,* 634 F.2d at 562 (citation omitted).

The appellants have not made the "strong showing of clear error [that] is required before a court should reexamine its decision in the prior appeal." *Turtle Mountain Band,* 612 F.2d at 521. As the appellants admitted at oral argument, all of the contentions they now make were made when the case previously was before the Court of Claims on the identical issues. That court carefully considered and rejected those arguments. This is an important reason for applying law of the case. As the Court of Claims explained in *Northern Helex,* in language equally applicable here:

> Our lengthy and detailed opinion in that case addressed the plaintiff's material arguments and explained why we rejected them. The plaintiff has not presented any new arguments that were not fully canvassed and evaluated before, nor placed the issues in a different context that provides insights and illuminations not previously available.

634 F.2d at 562.

Here, as in *Northern Helex,* "[w]e have no reason not to treat that earlier decision as the law of the case." *Id.*

The judgment of the United States Claims Court is affirmed.

AFFIRMED.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Appeal No. 84-700

SAMUEL T. GINDES and JOAN L. GINDES, ET AL., *Appellants,*

v.

THE UNITED STATES, *Appellee.*

NICHOLS, *Senior Circuit Judge,* concurring.

The appellant here had the curious idea that the appeal it took to us was an appeal not only from the Claims Court decision, but also from the decision by the panel in *Gindes v. United States,* 661 F.2d 194 (Ct. Cl. 1981). This idea was contrary to the basic structure of the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, which clearly regarded the court to be superseded, the Court of Claims, as having both appellate and trial functions. Decisions in performance of appellate functions were not intended to be subject to appellate review by the new court. By the rules of the old Court of Claims, whether a function was appellate depended on whether the appellate division performed it. Cross-motions for summary judgment were frequently the medium for appellate review, as for example in "Wunderlich" contract cases. Ct. Cl. Rules 161-166. Even when, as in tax cases, this was not so stated, the appellate status of an appellate division decision on a tax matter is clearly evident in the fact that the law provided no other appellate review.

When this court decided in *South Corp.* v. *United States,* 690 F.2d 1368 (Fed. Cir. 1982) that it would treat *all* Court of Claims appellate division decisions as binding precedents, this necessarily was a holding that this court would not sit in appellate review on *any* Court of Claims appellate

division decisions. If it is a binding precedent, it hardly needs the Law of the Case doctrine to immunize it from the kind of reexamination this appellant wanted us to make. Even should we think the Court of Claims decision "was clearly erroneous and would work a manifest injustice," it would seem we could act on this view only by recommending an *en banc* review under our rules.

Appellant also argued that there was a clear error and manifest injustice in applying Treasury Regulation § 1.754-1(b) retroactively to a transfer, antedating the regulation date, 1972. Unless those concerned with the transfer were endowed with second sight, they could not comply with procedure not yet spelled out in the regulations, it was argued. However, the predecessor 1956 version of the regulation stated that the election in question must be made with the tax return for the "first taxable year to which the election applies." The statute required at all relevant times that the Secretary should prescribe by regulation how the election should be exercised. As the regulation of 1956, however ambiguous, at least notified the taxpayer he had to meet a deadline he did not meet to make an effective election, the retroactivity argument is a weak one and the former decision is not clearly erroneous or such as would cause a "manifest injustice." The court perhaps might have gone the other way, but it considered the arguments and made its reasoned decision which had to be one way or the other. It is just not the kind of case to justify substituting one set of judges' views for those of another set.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 84-700
472-73 et al

SAMUEL T. GINDES & JOAN L. GINDES, ET AL., *Appellants*,

v.

THE UNITED STATES, *Appellee*.

JUDGMENT

ON APPEAL from the United States Claims Court

This CAUSE having been heard and considered, it is ORDERED and ADJUDGED: AFFIRMED.

DATED August 8, 1984

ENTERED BY ORDER OF THE COURT

George E. Hutchinson, Clerk
/s/ GEORGE E. HUTCHINSON
Clerk

ISSUED AS A MANDATE: August 30, 1984
COSTS: Against, Appellants.
PRINTING.................. $26.88
TOTAL $26.88

APPENDIX C

OPINION
(Filed September 23, 1981)

IN THE UNITED STATES COURT OF CLAIMS

(Decided September 23, 1981)

Nos. 472-73 and 57-76

SAMUEL T. GINDES and JOAN L. GINDES
v. THE UNITED STATES

Nos. 473-73 and 58-76

EDWARD H. KAPLAN
v. THE UNITED STATES

Nos. 474-73 and 59-76

JEROME A. and DEENA L. KAPLAN
v. THE UNITED STATES

Nos. 60-76

NATHAN SINROD, Trustee for the benefit of Edward H. Kaplan,
v. THE UNITED STATES

***Werner Strupp*, attorney of record, for plaintiff.**

Ellen C. Specker, with whom was *Acting Assistant Attorney General John F. Murray*, for defendant. *Theodore D. Peyser* and *Robert S. Watkins*, of counsel.

Before COWEN, Senior Judge, KASHIWA and BENNETT, *Judges*.

ON DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

KASHIWA, Judge, delivered the opinion of the court:

These cases are before the court on cross motions for partial summary judgment. There is no issue of material fact. We hold in defendant's favor after hearing oral argument.

During his life, Charles I. Kaplan (Charles) participated in numerous business undertakings with others. According to a Stipulation of Facts filed by the present parties, these enterprises were actively engaged in the business of operating and managing, through independent property management firms, apartment house complexes, commercial office buildings, shopping centers, and other rental properties. The principal assets of these enterprises were, with only two minor exceptions,[1] depreciable realty on which substantial depreciation had been taken. Consistent with the active conduct of a business, these enterprises annually incurred substantial operating expenses. Each enterprise maintained its own books of account as a partnership or

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[1] Two of the 19 partnerships we discuss *infra* held only unimproved realty.

joint venture. Following regular audits, a certified public accountant prepared financial statements treating each enterprise as a partnership or joint venture. For purposes of the federal income tax, partnership returns were filed on a calendar basis in which allowances for depreciation and the operating expenses as well as the income generated were set out.[2] These practices apparently were followed consistently once each enterprise commenced business.[3] For convenience' sake, we refer to these enterprises as partnerships.

Taxpayers Edward H. Kaplan (Edward), Jerome A. Kaplan (Jerome), and Joan L. Gindes (Joan)[4] are the children of Charles and Mary Kaplan (Mary). In 1950

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[2] Under the scheme of Subchapter K of the Internal Revenue Code of 1954 (Code), 26 U.S.C. (I.R.C.) §§ 701 *et seq.*, partnerships are required to file informational returns but are not taxed on their income. Instead, each partner takes a distributive share of income or loss and of any separately stated items. Thus, the individual partner is taxed. Where a partnership interest is owned by an entity which is not itself subject to taxation, as for example another partnership or certain kinds of trusts, the distributive share is generally passed through the intermediate level without taxation. Ultimately, some person (whether individual or corporate) will receive the distributive share. Aberrations from the normal taxing pattern may occur due to the tiering, however, as where interposition of a trust may "trap" partnership losses. See, *e.g.*, I.R.C. §§ 652(a) and 662(a).

[3] Of the 19 enterprises involved in this litigation, two date from the 1940's, four from the 1950's, eight from 1960 or 1961, and three from 1962 or 1963. The court has no information as to when the remaining two enterprises commenced business.

[4] Deena L. Kaplan and Samuel T. Gindes are parties in these actions only because each filed a joint return with their respective spouses, Jerome and Joan.

Mary established trusts for the benefit of Edward and Jerome (the inter vivos trusts). Nathan Sinrod and Charles were named as co-trustees. As of December 31, 1963, Charles had transferred a portion of his interest in seven of the partnerships to the inter vivos trusts.[5] Charles died testate on January 27, 1964. His will created, *inter alia,* trusts benefiting Edward, Jerome, and Joan (the testamentary trusts). The corpus of each testamentary trust was comprised of interests Charles held at the time of death in the 19 partnerships. These 19 included the seven partnerships listed in note 5, *supra,* in which interests had been given to the inter vivos trusts.

Charles' estate tax return was filed on April 27, 1965. The partnership interests held at death were included as assets of the gross estate, but the partnership interests transferred to the inter vivos trusts were not. Upon audit, the Internal Revenue Service (IRS) determined in August 1967 that certain of the partnership interests held at the

[5] The partnership interests given by Charles to the inter vivos trusts were as follows:

Partnership	% Interest owned by Edward Kaplan inter vivos trust	% Interest owned by Jerome Kaplan inter vivos trust
Chillum Road Shopping Center	6.0	6.0
Dupont Park Apartments	2.78	2.78
4000 Massachusetts Avenue	2.5	2.5
1000 Connecticut Avenue	5.0	5.0
Riddell Building Parking Garage	5.0	5.0
1700 K Street, N.W.	2.5	2.77
1730 K Street, N.W.	7.5	7.5

time of death had been valued too low [6] and that the partnership interests transferred to the inter vivos trusts should have been included in the gross estate. A statutory notice of deficiency was sent in January 1968.

In March 1968 the estate filed a timely petition in the Tax Court seeking a redetermination of the deficiency. In its petition, the estate contested only one of the new valuations, but asserted any estate inclusion of the interests transferred to the inter vivos trusts was incorrect. Eventually, the Government conceded the original valuation of the contested interest had been correct while the estate conceded inclusion of the interests transferred to the inter vivos trusts was proper. A stipulated decision to this effect was entered by the Tax Court in May 1969 (sometimes

[6] The partnership interests reported in the 1965 return were valued as follows:

Partnership	% Interest	Reported value	Corrected value
Chillum Road Shopping Center	7.0	$ 24,000	
Dupont Park Apartments	7.22	24,270	$ 38,000
4000 Massachusetts Avenue	10.0	225,200	275,000
1000 Connecticut Avenue	7.5	191,040	250,000
Riddell Building Parking Garage	7.5	22,700	
1700 K Street, N.W.	11.11	159,400	250,000
1730 K Street, N.W.	7.5	125,802	200,000
Berkshire Associates	5.0	93,050	
Cathedral Parkway Associates	15.0	45,000	
The Essex	25.0	201,000	226,500
20th & M Streets	12.69	190,350	
2401 Calvert St., N.W.	20.834	31,250	
1760-64 K Street, N.W.	20.0	17,200	
Berkshire-Richmond	50.0	Worthless	56,700
Mall Development Associates	25.0	Worthless	6,250
Parkland Gardens	12.5	28,500	42,000
Garden Manor Apartments	25.0	116,250	
Hague Towers	12.5	13,750	
3100 M Street, N.W.	100.0	35,000	

referred to hereafter as the 1969 inclusion or the 1969 stipulation).

Thereafter, plaintiffs apparently became aware that if a proper election was made by each partnership under I.R.C. § 754[7] and the regulations promulgated thereunder,[8] each

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[7] I.R.C. § 754 provides as follows:

"If a partnership files an election, in accordance with regulations prescribed by the Secretary, the basis of partnership property shall be adjusted, in the case of a distribution of property, in the manner provided in section 734 and, in the case of a transfer of a partnership interest, in the manner provided in section 743. Such an election shall apply with respect to all distributions of property by the partnership and to all transfers of interests in the partnership during the taxable year with respect to which such election was filed and all subsequent taxable years. Such election may be revoked by the partnership, subject to such limitations as may be provided by regulations prescribed by the Secretary."

[8] The relevant portion of Treas. Reg. § 1.754-1(b)(1), as amended in 1972, provides the manner of making the I.R.C. § 754 election:

"(b) *Time and method of making election.*

"(1) An election under section 754 and this section to adjust the basis of partnership property under sections 734(b) and 743(b), with respect to a distribution of property to a partner or a transfer of an interest in a partnership, shall be made in a written statement filed with the partnership return for the taxable year during which the distribution or transfer occurs. For the election to be valid, the return must be filed not later than the time prescribed by paragraph (e) of § 1.6031-1 (including extensions thereof) for filing the return for such taxable year (or before August 23, 1956, whichever is later). * * *"

Thus, as the partnerships were with but one exception calendar year taxpayers, the elections were required with the partnership returns due April 15, 1965, *i.e.*, the returns for the taxable period in which Charles' death occurred. The remaining partnership, Cathedral Parkway Associates, was changing at the time to a fiscal

partnership could adjust its bases in its assets upward under I.R.C. § 743(b) to reflect the inclusion of each interest in Charles' gross estate.[9] With higher bases in the partnership assets, greater annual depreciation allowances would be generated by the partnerships and distributed under I.R.C. § 702 to the trusts holding the partnership interests. Thereafter, the trusts would pass on the higher depreciation deductions to the trusts' beneficiaries, Edward, Jerome, and Joan, for use on their personal tax returns.

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year ending September 30. Under I.R.C. § 442 and I.R.C. § 443, Cathedral Parkway Associates' return for the period covering Charles' death was due on January 15, 1965. Thus, under Treas. Reg. § 1.754-1(b)(1), its election was to be made at that time.

The taxpayers here, as did those in *Jones* v. *United States*, 213 Ct. Cl. 529, 553 F. 2d 667 (1977), dispute the application of this regulation as amended in 1972 to Charles' 1964 death as unfairly retroactive and otherwise invalid.

[9] I.R.C. § 743(b) and its cousin, I.R.C. §734(b), provide exceptions to the general rule that transactions affecting the *partner's* basis in the partnership (known to practitioners in the field as the "outside basis"), such as partnership distributions or transfers of an interest, do not alter the *partnership's* bases in partnership assets (the "inside bases"). I.R.C. § 743(b) and I.R.C. § 734(b) may be two-edged swords, however, for if an I.R.C. § 754 election is in effect, those provisions may on appropriate facts require a *downward* adjustment to the inside bases and, thus, lower depreciation allowances. Not surprisingly, the election under I.R.C. § 754 (which brings both I.R.C. § 743(b) and I.R.C. § 734 (b) into play) is styled an "optional election," to be made at the partnership's peril. Once made, the I.R.C. § 754 election is revocable only for business reasons and only with the Service's permission. *See* Treas. Reg. § 1.754-1(c).

The parties do not dispute that on the present facts a valid I.R.C. § 754 election would provide, through I.R.C. § 743(b), increased depreciation deductions to these taxpayers. Thus, we have not set out I.R.C. § 743(b).

No I.R.C. § 754 elections, however, were in effect on the date of Charles' death. Moreover, no I.R.C. § 754 elections were made with the partnership returns for the period in 1964 in which Charles' death occurred.[10] See note 8, *supra*. The estate return as filed in 1965 included numerous partnership interests, and thus, the I.R.C. § 754 election would have been of benefit at that time. However, it was apparently only in 1969, when the partnership interests held in the inter vivos trusts were included in the gross estate, that plaintiffs realized additional depreciation could be claimed at the partnership level and passed ultimately to Edward, Jerome, and Joan as individuals.[11]

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[10] Nine partnerships filed I.R.C. § 754 elections with their 1969 tax returns. These nine included six of the seven partnerships listed in note 5, *supra*, in which the inter vivos trusts held interests.

[11] Although the Stipulation of Facts, petitions, and this record are hardly models of clarity, it appears some of the testamentary trusts filed schedules on their 1965, 1966, and 1967 fiduciary returns reflecting the 1965 gross estate inclusions and a presumed concomitant increase in the partnerships' inside bases per I.R.C. § 743(b). This was apparently done even though no I.R.C. § 754 elections were then in effect and even though the partnerships' depreciation schedules did not show this added depreciation. The benefits of the added allowances, however, were never passed to the beneficiaries. The testamentary trusts during this period apparently reflected the added allowances as net losses from the partnerships and did not pass those net losses on to the individual beneficiaries. If anything, the listing of this added depreciation in the fiduciary returns for 1965, 1966, and 1967 reinforces our conclusion *infra* that requiring the I.R.C. § 754 elections to be made by the close of the partnerships' 1964 taxable years is reasonable. Adequate information was apparently present in 1965 on which the partnerships could have determined the efficacy of the election. As the record is not precisely clear, however, we rest our decision *infra* only in part of this basis.

Thereafter, these plaintiffs filed refund claims for various years based on added depreciation allowances allegedly passed to them through the trusts. Edward filed refund claims for 1961, 1962, 1963, 1964, and 1965 on July 30, 1969; for 1966 on October 28, 1971; for 1967 on May 10, 1974; and for 1968 on October 17, 1974. Edward's refund theories were bottomed on larger personal depreciation deductions in 1964, 1965, 1966, 1967, and 1968. The larger deductions in 1964 and 1965 allegedly gave rise to net operating losses in those years which could be carried to 1961, 1962, and 1963, causing overpayments in the earlier years as well. Similarly, larger depreciation deductions in 1967 and 1968 allegedly generated net operating loss, investment credit, and foreign tax credit carrybacks which resulted in further claims for 1964 and 1966. Jerome filed refund claims for 1961, 1962, 1963, 1964, and 1965 on July 24, 1969 and for 1966, 1967, and 1970 on November 2, 1973. Joan filed a refund claim for 1961 on July 8, 1969; for 1964 on October 22, 1969; and claims for 1966 and 1968 on November 2, 1973. In his fiduciary capacity, Nathan Sinrod in May 1971 filed a refund claim alleging Edward's inter vivos trust had overpaid its 1966 taxes. The theories of Jerome's personal claims, Joan's personal claims, and the fiduciary claim were similar to those presented by Edward, *i.e.*, that larger depreciation allowances were available to the partnerships which could be passed to the trusts and ultimately, the beneficiaries. After the refund claims were denied or plaintiffs waived notice of denial, these petitions were filed. Consolidation occurred and cross motions for partial summary judgment followed. The cross motions are a commendable attempt to clear much of the legal underbrush from this controversy.

The parties are apparently in agreement that the literal language of I.R.C. § 6511[12] bars Edward's and Jerome's

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[12] In relevant part, I.R.C. § 6511(a) and (b)(1) provides:

claims for 1964. Their refund claims for that year were filed on July 30, 1969, and July 24, 1969, respectively, more than 3 years after April 15, 1965, when their 1964 returns were filed and the tax shown thereon paid.[18] As to Jerome's and Edward's claims for pre-1964 years based on a net operating loss carryback from 1964, the Code is clear that taxpayers have only a 3-year period, running from the due date of the 1964 return, in which to claim for the carryback years. I.R.C. § 6511(d)(2)(A). Thus, the claims based on the carryback from 1964 also appear barred. Similarly, any recovery by Jerome is limited by the literal language of

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"§ 6511. *Limitations on credit or refund*

"(a) *Period of limitation on filing claim*

"Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid. Claim for credit or refund of an overpayment of any tax imposed by this title which is required to be paid by means of a stamp shall be filed by the taxpayer within 3 years from the time the tax was paid.

"(b) *Limitation on allowance of credits and refunds*

"(1) *Filing of claim within prescribed period*

"No credit or refund shall be allowed or made after the expiration of the period of limitation prescribed in subsection (a) for the filing of a claim for credit or refund, unless a claim for credit or refund is filed by the taxpayer within such period."

[18] Jerome's and Edward's claims for 1964 (and related carryback years) do not appear to be the only claims the plaintiffs assert which are barred by I.R.C. § 6511. However, the parties have neither briefed nor argued other applications of I.R.C. § 6511 and we need not, for purposes of these cross motions, rule further.

I.R.C. § 6511(b)(2)(B) to the portion of the 1966 tax paid within 2 years of the refund claim, $1,219.36.[14]

Moreover, even to the extent that I.R.C. § 6511 does not bar or limit these actions, the Government contends these petitions have further problems. Treas. Reg. § 1.754-1(b)(1), *supra,* requires, says the Government, that the I.R.C. § 754 election be made by the partnership "with the partnership return for the taxable year during which the distribution or transfer occurs." As the "transfer" of all

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[14] I.R.C. § 6511(b)(2)(B) provides:

"(B) *Limit where claim not filed within 3-year period*

"If the claim was not filed within such 3-year period, the amount of the credit or refund shall not exceed the portion of the tax paid during the 2 years immediately preceding the filing of the claim."

Jerome filed his 1966 return on April 15, 1967. A deficiency for that year and interest thereon were assessed on June 4, 1971, totaling $1,919.68. The assessments were partially satisfied by a credit of $700.32 (which arose April 15, 1971). Jerome filed a refund claim for 1966 on November 2, 1973. Thereafter, the balances of the assessments, $1,219.36, were satisfied by a payment of $1,470.66 on December 13, 1973. The overpayment of $251.30 was credited to Jerome's other tax liabilities.

Neither party has discussed whether the $700.32 credit should be considered paid against the 1966 deficiency when the credit *arose,* April 15, 1971, or when the deficiency was *asserted,* June 4, 1971. Assuming *arguendo* the date most favorable to the taxpayer, June 4, 1971, is correct, the credit of $700.32 was still not paid against the 1966 deficiency within 2 years of the November 2, 1973 refund claim. As to the $1,219.36 of the December 13, 1973, payment which was used to satisfy the 1966 deficiency, we note that payment to be *after* the 1966 refund claim was filed. Thus, strictly speaking, no tax was paid within the 2 years "immediately preceding" the refund claim. The Government, however, rejects this Draconian view of I.R.C. § 6511(b)(2)(B) and concedes Jerome may recover up to the $1,219.36 paid on December 13, 1973, against the 1966 taxes.

interests included in Charles' estate occurred for federal tax purposes on Charles' death in 1964, the argument goes, only an I.R.C. § 754 election filed with each partnership return for 1964 could allow the I.R.C. § 743(b) adjustments. Thus, the Government concludes, once the partnerships failed to elect under I.R.C. § 754 in their returns for the year of Charles' death, no I.R.C. § 743(b) adjustments can be made based on that death, regardless of when actual inclusion within the gross estate results or when subsequent I.R.C. § 754 elections are made.

In reply, plaintiffs advance two general arguments. Plaintiffs argue that Treas. Reg. § 1.754-1(b)(1) as amended in 1972 should not apply to them or is invalid and that the doctrine of equitable recoupment excuses the failures to file timely refund claims and I.R.C. § 754 elections.

Plaintiffs assert a variety of theories why Treas. Reg. § 1.754-1(b)(1) is inapplicable or invalid. We considered and rejected these arguments in *Jones* v. *United States*, 213 Ct. Cl. 529, 553 F. 2d 667 (1977). *Jones* of course binds us, *see, e.g., Alabama Hospital Association* v. *United States*, Ct. Cl. No. 465-79C (slip op. of June 17, 1981, at 9), and even if it did not, we would similarly reject these arguments upon *de novo* consideration today. For example, plaintiffs assert that Treas. Reg. § 1.754-1(b)(1) as amended in 1972 is unfairly retroactive when applied to Charles' 1964 death. A former version, admittedly in effect in 1964, left unclear when the I.R.C. § 754 election was to be made. As *Jones* recognized, however, such an argument ignores I.R.C. § 7805(b), which provides that Treasury Regulations are to be retroactive absent a limitation on retroactivity. Retroactive regulations are clearly the rule under the Code, and as no limitation is provided within Treas. Reg. § 1.754-1(b)(1), we must apply it in that manner.

Plaintiffs also assert, as did their counterpart in *Jones*, that requiring the I.R.C. § 754 election with the next part-

nership return after a death allows inadequate time for an "informed" election. We leave aside other familiar examples when the Code requires elections before one knows with absolute certainty that the particular election will be of benefit. It is clear here, as it was in *Jones,* that adequate information was available on which each partnership could evaluate the benefits of an I.R.C. § 754 election. The partnership returns for 1963 disclosed that these partnerships held assets on which substantial depreciation had been taken. We observed in *Jones* that circumstance should have indicated the potential benefits of I.R.C. § 754 elections, and we think no differently today. We note further that the present partnerships had a considerably *longer* period[15] than did the *Jones* partnerships in which to decide on I.R.C. § 754. At most, the 1969 stipulation which included additional partnership interests within Charles' estate merely *increased* the benefits accruing to the partnerships (and these plaintiffs) from timely I.R.C. § 754 elections.[16] It is thus of no moment that plaintiffs say they were unaware the Internal Revenue Service would require the further inclusions in 1969.

Nor do we think the present plaintiffs are aided, any more than the *Jones* plaintiff was, by the subsequent I.R.C. § 754 elections filed in 1969 by nine of Charles' former partnerships. See note 10, *supra.* Both I.R.C. § 754, *supra*

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[15] With the exception of Cathedral Parkway Associates, these partnerships had almost 15 months from Charles' death to elect. Cathedral Parkway Associates had just under 12 months to elect. *See* note 8, *supra.* The *Jones* partnerships had approximately 6 months.

[16] Indeed, as note 11, *supra,* discusses, at least some of the testamentary trusts filed schedules with their 1965, 1966, and 1967 fiduciary returns which apparently reflected additional depreciation attributable to an assumed I.R.C. § 743(b) adjustment in light of Charles' death and the *original* estate return.

note 7, and Treas. Reg. § 1.754-1(a) are clear that such elections apply to all distributions of partnership property and to all transfers of partnership interests during the election year of the partnership and all subsequent years. The 1969 elections, therefore, can have no impact on the transfer of interests occasioned by the death of Charles, even as to the interests first included in 1969. The Code and the Regulations speak not of the year when *inclusion* occurs but, rather, of when the *transfer* of the interest takes place. Whatever vestiges of ownership Charles retained sufficient to cause inclusion in his estate after the partnership interests were placed in the inter vivos trusts, those vestiges of his ownership clearly terminated upon his death. Thus, within the meaning of I.R.C. § 754 and Treas. Reg. § 1.754-1(a), the latest the "transfer" of the interests held by the inter vivos trusts could have occurred when upon Charles' death in 1964.[17]

Based on the foregoing, it would appear that because no I.R.C. § 754 elections were filed with the partnership returns for 1964, no I.R.C. § 743(b) adjustments can be made based on Charles' death. Plaintiffs however contend that as the Government required additional inclusions in Charles' estate in 1969, the doctrine of equitable recoupment allows them to now claim additional depreciation in years otherwise barred by I.R.C. § 6511. We reject this notion out of hand.

At one time it appeared that a broad scope should be accorded the doctrine of recoupment as a means of miti-

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[17] Indeed, it might be argued based solely on I.R.C. § 754 and Treas. Reg. § 1.754-1(a) that the "transfer" occurred when Charles placed the interests in the inter vivos trusts. The Government does not make such an argument, no doubt based on Treas. Reg. § 1.743-1(a) which seems to limit "transfers" to dispositions by sale or exchange and to circumstances where the partner dies.

gating the abbreviated limitations period applicable to tax litigation. See *Bull* v. *United States*, 295 U. S. 247 (1935); *Stone* v. *White*, 301 U. S. 532 (1937). Nine years after *Stone* v. *White*, however, the Supreme Court held in *Rothensies* v. *Electric Storage Battery Co.*, 329 U. S. 296 (1946), that the doctrine had a far more circumspect application to tax cases: [18]

> * * * The essence of the doctrine of recoupment is stated in the *Bull* case: "recoupment is in the nature of a defense arising out of some feature of the transaction upon which the plaintiff's action is grounded." 295 U. S. 247, 262. It has never been thought to allow one transaction to be offset against another, but only to permit a transaction which is made the subject of suit by a plaintiff to be examined in all its aspects, and judgment to be rendered that does justice in view of the one transaction as a whole.
>
> The application of this general principle to concrete cases in both of the cited decisions is instructive as to the limited scope given to recoupment in tax litigation. *In both cases a single transaction constituted the taxable event claimed upon and the one considered in recoupment. In both, the single transaction or taxable event had been subjected to two taxes on inconsistent legal theories, and what was mistakenly paid was recouped against what was correctly due.* In *Bull* v.

[18] One possible explanation for the shift in direction taken by the Court lies with the passage during the intervening years of Code provisions specifically mitigating the effect of the limitations provisions. Those provisions, presently I.R.C. §§ 1311-1314, are among the most arcane and technical in the Code. Although not articulated in *Electric Storage Battery*, the Court might well have thought broad application of recoupment inappropriate once Congress detailed rather specific instances in which the limitations provisions could be set aside.

United States, the one taxable event was receipt by executors of a sum of money. An effort was made to tax it twice—once under the Income Tax Act as income to the estate after decedent's death and once under the Estate Tax Act as part of decedent's gross estate. This Court held that the amount of the tax collected on a wrong theory should be allowed in recoupment against an assessment under the correct theory. In *Stone* v. *White,* likewise, both the claim and recoupment involved a single taxable event, which was receipt by an estate of income for a period. The trustees had paid the income tax on it but this Court held it was taxable to the beneficiary. Assessment against the beneficiary had meanwhile become barred. Then the trustees sued for a refund, which would inure to the beneficiary. The Court treated the transaction as a whole and allowed recoupment of the tax which the beneficiary should have paid against the tax the Government should not have collected from the trustees. Whatever may have been said indicating a broader scope to the doctrine of recoupment, these facts are the only ones in which it has been applied by this Court in tax cases. [*Id.* at 299-300. Emphasis supplied; footnote omitted.]

The critical inquiry, of course, is whether a "single transaction or taxable event [has] been subjected to two taxes on inconsistent legal theories, * * *" and we have so held in a succession of cases since *Electric Storage Battery* was decided. *See, e.g., Ford* v. *United States,* 149 Ct. Cl. 558, 276 F. 2d 17 (1960); *Brigham* v. *United States,* 200 Ct. Cl. 68, 470 F. 2d 571 (1972), *cert. denied,* 414 U. S. 831 (1973); *Arthur E. Evans Trust* v. *United States,* 199 Ct. Cl. 98, 462 F. 2d 521 (1972); *Wilmington Trust Co.* v. *United States,* 221 Ct. Cl. ——, 610 F. 2d 703 (1979). *See also Ellard* v. *United States,* Ct. Cl. No. 351-80T (ordered entered July 28, 1981, order at 3-4). Plaintiffs' somewhat confused legal theory is that the 1969 inclusion is part of the same trans-

action as plaintiffs' non-deduction of added depreciation and has been consistently treated. Plaintiffs' contentions are wide of the mark. Plaintiffs' non-deductions stem from the failure of the partnerships to elect under I.R.C. § 754, not from the inclusions of assets within Charles' gross estate. Plaintiffs are clearly correct that there is a relationship between these elements, viz., a properly made I.R.C. § 754 election would have led to an I.R.C. § 743(b) adjustment based on inclusion within Charles' estate and ultimately greater depreciation deductions to these plaintiffs. But that is a far cry from labeling these as components of an integral tax event. Clearly what the *Electric Storage Battery* Court had in mind was the sort of double inclusion (wrongful inclusion within gross estate, proper inclusion in the estate's income) that occurred in *Bull* v. *United States, supra,* or the sort of double noninclusion (wrongful exclusion from income by beneficiary, proper exclusion from income by trust) that occurred in *Stone* v. *White, supra,* of a single item of income, *i.e.,* a separate and discernible fund which must either be included or not included. Mere relation, as occurs when elections may give rise to greater tax benefits, will not suffice, no matter how the equity-minded judge might otherwise feel. *See Wilmington Trust Co., supra* at ——, 610 F. 2d at 713-714. *See also Ford, supra* at 569, 276 F. 2d at 23. We need not rest our denial of equitable recoupment on this basis alone, however. A second element which any party seeking recoupment must show is that there be inconsistency between the two treatments of the single event. Plaintiffs here can show no such inconsistency between the non-elections in the partnerships' 1964 returns (and plaintiffs' concomitant non-deductions) and the 1969 inclusion within Charles' estate. As we have set our earlier, *supra* note 9, partnerships have an *option* to elect under I.R.C. § 754 and need not do so. That option is a recognition, no doubt, that the I.R.C. § 743(b) and I.R.C. § 734(b) adjustments triggered by the I.R.C. § 754 election may require a *downward* adjustment to the partnership's bases

in its assets and ultimately reduced depreciation deductions available for distribution. The 1969 inclusion is not inconsistent with the non-election but demonstrates merely that the partnerships made a bad choice. Once a taxpayer makes such choices, he usually must live with them. *E.g., Montgomery Coca-Cola Bottling Co.* v. *United States*, 222 Ct. Cl. ——, ——, 615 F. 2d 1318, 1324 (1980). These non-elections are ones with which the partnerships, and ultimately these taxpayers, must abide. The Commissioner has not been inconsistent here.

We conclude therefore that there was no single transaction which was treated inconsistently.[19] Equitable recoupment thus cannot excuse either plaintiffs' failure to file timely refund claims or the partnerships' failure to timely elect under I.R.C. § 754 so as to make I.R.C. § 743 (b) applicable to Charles' death. We so hold. So much of plaintiffs' petitions which claim refunds (on any theory) in years barred by I.R.C. § 6511 or which claim refunds (in any year) based on greater depreciation arising from Charles' death must be dismissed.

Plaintiffs' further arguments are of but little merit. Plaintiffs now argue that these enterprises were not partnerships. Plaintiffs' theory is apparently that the trusts owned the depreciable assets directly and thus under I.R.C. § 1014 would receive a step-up in basis as a result of inclusion of the assets within Charles' estate. The partnerships' failures to elect under I.R.C. § 754 would therefore be irrelevant. Plaintiffs could supposedly claim greater

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[19] *Boyle* v. *United States*, 355 F. 2d 233 (3d Cir. 1965), on which plaintiffs rely, is not to the contrary. That case presents a classic application of recoupment, as dividend arrearages were included improperly within an estate, and thereafter, when the estate return had closed, were included again as income to the beneficiaries when the arrearages were paid. Such a double inclusion, of course, is what occurred in *Bull* v. *United States, supra.*

depreciation in all open years,[20] and thus the contention that these enterprises are not partnerships presents an alternate theory of refund. Whether a partnership exists is an issue of fact, *see, e.g., Commissioner* v. *Culbertson,* 337 U. S. 733, 742 (1949), and we normally remand factual issues to our trial division for a report by a trial judge. Thereafter, if a party excepts to the report, we review the report including findings of fact completely. *Compare Commonwealth of Pennsylvania, Department of Transportation* v. *United States,* 226 Ct. Cl. ——, ——, 643 F. 2d 758, 767, *pet. for cert. filed,* May 23, 1981 (trial judge's recommended fact findings concurred in by the court after review of the record) *with Montgomery Coca-Cola, supra* at ——, 615 F. 2d at 1323 (the court is free to reject the trial judge's recommended fact findings and make its own findings from the record). A remand, however, is not appropriate here. A careful review of the refund claims filed with the IRS discloses that plaintiffs did not raise this issue administratively. It has long been settled that to the extent refund petitions in this court state theories at variance with those presented to the IRS, the added theories must be disregarded. *E.g., Union Pacific R. R.* v. *United States,* 182 Ct. Cl. 103, 113-114, 117, 389 F. 2d 437, 444-445, 447 (1968), *cert. denied,* 395 U. S. 944 (1969). *See Disabled American Veterans* v. *United States,* Ct. Cl. No. 360-76 (slip op. of May 20, 1981, at 1-4). Plaintiffs concede they did not expressly present this theory to the IRS but argue that the claims' general language places the IRS on notice of the theory. These refund claims do *inter alia* make reference to an "inherited" basis leading to greater depreciation. At best, those are oblique references which require the IRS to supply most of the substantive theory. That, of course, assumes the IRS identifies the reference as stating

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[20] I.R.C. §6511, *supra* note 12, would for example bar Jerome's and Edward's claims for 1964 and related carryback years.

an alternate theory rather than misstating the major theory, greater depreciation deductions attributable to an I.R.C. § 743(b) adjustment. Supplying substantive theory, of course, is presumably what plaintiffs' tax advisers were retained to do; and given the ease with which plaintiffs might have raised the partnership issue, we will not require the IRS to provide plaintiffs tax counsel. See *Union Pacific R. R.*, *supra* at 113-114, 389 F. 2d at 444-445. Moreover, we are not unmindful that these enterprises had long represented themselves in their tax returns and their financial statements to be partnerships. We need not decide today whether these plaintiffs should thereby be estopped to deny partnership status. *Compare Phillips* v. *United States*, 193 F. 2d 132 (5th Cir. 1951) (partner estopped to deny status) *with Powell* v. *Commissioner*, 26 T.C.M. 161 (1967) ("partner" not estopped). An examining agent could reasonably have assumed in light of these long-standing and consistent representations that plaintiffs would not, in the absence of language clearly expressing otherwise, be contesting whether these were partnerships. As we hold the IRS to have had no notice of these claims, it follows that plaintiffs may not raise the issue now. There are thus no issues of material fact which preclude partial summary judgment.

Based on the foregoing, we conclude that defendant's motions for partial summary judgment should be and are hereby granted with the petitions dismissed to that extent. Plaintiffs' cross motions for partial summary judgment should be and are hereby denied. The matter is remanded to the trial division for further proceedings consistent with this opinion.

APPENDIX D

INTERNAL REVENUE CODE

Sec. 754. Manner of Electing Optional Adjustment to Basis of Partnership Property

If a partnership files an election, in accordance with regulations prescribed by the Secretary, the basis of partnership property shall be adjusted, in the case of a distribution of property, in the manner provided in section 734 and, in the case of a transfer of a partnership interest, in the manner provided in section 743. Such an election shall apply with respect to all distributions of property by the partnership and to all transfers of interests in the partnership during the taxable year with respect to which such election was filed and all subsequent taxable years. Such election may be revoked by the partnership, subject to such limitations as may be provided by regulations prescribed by the Secretary.

INTERNAL REVENUE CODE

[Sec. 167(g)]

(g) Basis for Depreciation.—The basis on which exhaustion, wear and tear, and obsolescence are to be allowed in respect of any property shall be the adjusted basis provided in section 1011 for the purpose of determining the gain on the sale or other disposition of such property.

[Sec. 1011(a)]

(a) General Rule.—The adjusted basis for determining the gain or loss from the sale or other disposition of property, whenever acquired, shall be the basis (determined under section 1012 or other applicable sections of

this subchapter and subchapters C (relating to corporate distributions and adjustments), K (relating to partners and partnerships), and P (relating to capital gains and losses)), adjusted as provided in section 1016.

[Sec. 1011(b)]

(b) Bargain Sale to a Charitable Organization.—If a deduction is allowable under section 170 (relating to charitable contributions) by reason of a sale, then the adjusted basis for determining the gain from such sale shall be that portion of the adjusted basis which bears the same ratio to the adjusted basis as the amount realized bears to the fair market value of the property.

[Sec. 1041(a)]

(a) In General.—Except as otherwise provided in this section, the basis of property in the hands of a person acquiring the property from a decedent or to whom the property passed from a decedent shall, if not sold, exchanged, or otherwise disposed of before the decedent's death by such person, be—

(1) the fair market value of the property at the date of the decedent's death, or

(2) in the case of an election under either section 2032 or section 811(j) of the Internal Revenue Code of 1939 where the decedent died after October 21, 1942, its value at the applicable valuation date prescribed by those sections, or

(3) in the case of an election under section 2032A, its value determined under such section.

[Sec. 1041(b)]

(b) PROPERTY ACQUIRED FROM THE DECEDENT.—For purposes of subsection (a), the following property shall be considered to have been acquird from or to have passed from the decedent:

(1) Property acquired by bequest, devise, or inheritance, or by the decedent's estate from the decedent;

(2) Property transferred by the decedent during his lifetime in trust to pay the income for life to or on the order or direction of the decedent, with the right reserved to the decedent at all times before his death to revoke the trust;

(3) In the case of decedents dying after December 31, 1951, property transferred by the decedent during his lifetime in trust to pay the income for life to or on the order or direction of the decedent with the right reserved to the decedent at all times before his death to make any change in the enjoyment thereof through the exercise of a power to alter, amend, or terminate the trust;

(4) Property passing without full and adequate consideration under a general power of appointment exercised by the decedent by will;

(5) In the case of decedents dying after August 26, 1937, property acquired by bequest, devise, or inheritance or by the decedent's estate from the decedent, if the property consists of stock or securities of a foreign corporation, which with respect to its taxable year next preceding the date of the decedent's death was, under the law applicable to such year, a foreign personal holding company. In such case, the basis shall be the fair market value of such property at the date

of the decedent's death or the basis in the hands of the decedent, whichever is lower.

(6) In the case of decedents dying after December 31, 1947, property which represents the surviving spouse's one-half share of community property held by the decedent and the surviving spouse under the community property laws of any State, or possession of the United States or any foreign country, if at least one-half of the whole of the community interest in such property was includible in determining the value of the decedent's gross estate under chapter 11 of subtitle B (section 2001 and following, relating to estate tax) or section 811 of the Internal Revenue Code of 1939.

(7) In the case of decedents dying after October 21, 1942, and on or before December 31, 1947, such part of any property, representing the surviving spouse's one-half share of property held by a decedent and the surviving spouse under the community property laws of any State, or possession of the United States or any foreign country, as was included in determining the value of the gross estate of the decedent, if a tax under chapter 3 of the Internal Revenue Code of 1939 was payable on the transfer of the net estate of the decedent. In such case, nothing in this paragraph shall reduce the basis below that which would exist if the Revenue Act of 1948 had not been enacted.

(8) In the case of decedents dying after December 31, 1950, and before January 1, 1954, property which represents the survivor's interest in a joint and survivor's annuity if the value of any part of such interest was required to be included in determining the value of decedent's gross estate under section 811 of the Internal Revenue Code of 1939.

(9) In the case of decedents dying after December 31, 1953, property acquired from the decedent by rea-

son of death, form of ownership, or other conditions (including property acquired through the exercise or non-exercise of a power of appointment), if by reason thereof the property is required to be included in determining the value of the decedent's gross estate under chapter 11 of subtitle B or under the Internal Revenue Code of 1939. In such case, if the property is acquired before the death of the decedent, the basis shall be the amount determined under subsection (a) reduced by the amount allowed to the taxpayer as deductions in computing taxable income under this subtitle or prior income tax laws for exhaustion, wear and tear, obsolescence, amortization, and depletion on such property before the death of the decedent. Such basis shall be applicable to the property commencing on the death of the decedent. This paragraph shall not apply to—

(A) annuities described in section 72;

(B) property to which paragraph (5) would apply if the property had been acquired by bequest; and

(C) property described in any other paragraph of this subsection.

Sec. 7805. Rules and Regulations.

[Sec. 7805(a)]

(a) Authorization.—Except where such authority is expressly given by this title to any person other than an officer or employee of the Treasury Department, the Secretary shall prescribe all needful rules and regulations for the enforcement of this title, including all rules and regulations as may be necessary by reason of any alteration of law in relation to internal revenue.

(b) Retroactivity of Regulations or Rulings.—The Secretary may prescribe the extent, if any, to which any ruling or regulation, relating to the internal revenue laws, shall be applied without retroactive effect.

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1956 Regulation

Treasury Regulations on Income Tax (26 C.F.R. 1968 ed.)

Sec. 1.754-1 *Time and manner of making election to adjust basis of partnership property*

* * *

(b) *Method of making election.* An election under this section to adjust the basis of partnership property under sections 734(b) and 743(b) shall be made in a written statement filed with the partnership return for the first taxable year to which the election applies (or before August 23, 1956). The statement shall (1) set forth the name and address of the partnership making the election, (2) be signed by any one of the partners, and (3) contain a

declaration that the partnership elects to apply the provisions of section 734(b) and section 743(b). * * *

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1972 Regulation

Treasury Regulations on Income Tax (26 C.F.R.)

Section 1.754-1 *Time and manner of making election to adjust basis of partnership property*

* * *

(b) *Time and method of making election.* (1) An election under section 754 and this section to adjust the basis of partnership property under sections 734(b) and 743(b), with respect to a distribution of property to a partner or a transfer of an interest in a partnership, shall be made in a written statement filed with the partnership return for the taxable year during which the distribution or transfer occurs. For the election to be valid, the return must be filed not later than the time prescribed by paragraph (e) of Section 1.6031-1 (including extensions thereof) for filing the return for such taxable year (or before August 23, 1956, which is later).